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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

NO. 734

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

BRIEF OF PETITIONER

Upon Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit

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INTRODUCTION

This brief is supplemental to petitioner's brief supporting petition for writ of certiorari and responsive to respondent's brief resisting such petition.

OPINIONS BELOW

Two opinions were delivered by the District Court. Both were written by District Judge Jeremiah Neterer being filed upon July 14, 1931, and August 4, 1931. The opinion on the original hearing (R. 26) was not reported; the opinion on rehearing (R. 32) was reported in 53 Fed. (2d) 492-495.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilbur and Sawtelle, with District Judge Norcross—written by Circuit Judge Wilbur) was filed September 8, 1932, (R. 64) and was reported in 61 Fed. (2d) 187.

JURISDICTION

The jurisdiction of this court is invoked under Judicial Code, Sec. 240(a) as amended by act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A. Sec. 347).

The decree of the Circuit Court of Appeals to be reviewed was entered January 10, 1933, (R. 86.) No petition for rehearing was ever filed relative to

such final decree. Petition for writ of certiorari was filed with the Clerk of this court February 27, 1933. Order granting such petition was filed April 10, 1933, (R. 99).

STATEMENT

In November, 1929, petitioner Krauss Bros. Lumber Company, as shipper, and respondent Dimon Steamship Corporation, as carrier, signed an affreightment contract, whereby certain lumber cargo was to be loaded in January, 1930, on the Pacific Coast at ports of Puget Sound and Grays Harbor aboard the steamship "Pacific Cedar," to be transported to the Atlantic Coast and to be discharged at the ports of Philadelphia and New York, all in consideration of freight, the rate and amount thereof to be determined by the following clause:

> "Rate of freight $10.00 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9).

Pursuant to such engagement, said steamship "Pacific Cedar" loaded said cargo at agreed Pacific Coast ports in January, 1930, and, after transportation in due course, discharged the same at agreed Atlantic Coast ports in March, 1930. During such discharge respondent, in behalf of said steamship "Pacific Cedar," demanded and collected from petitioner the

freight on said lumber cargo at the rate of $10.00 per M. feet. (R. 5, 6).

During the month of January, 1930, the Luckenbach Steamship Company, a "regular intercostal carrier," moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to-wit: $8.50 per M feet. (R. 6).

Later petitioner demanded from respondent return of freight in the amount of the difference between the $10.00 rate paid and the $8.50 rate applicable. Such demand was refused. (R. 6).

Upon May 18, 1931, petitioner's libel in personam against respondent and in rem against said steamship "Pacific Cedar" was filed in admiralty, alleging for a cause of action the facts above summarized, seeking repayment of such excess freight, and asserting a maritime lien therefor (R. 3, 12.) Said steamship, upon due process in rem, was forthwith attached, and by respondent on bond was promptly released (R. 12, 16, 21).

On June 18, 1931, respondent filed exceptions to said libel upon two grounds:

(1) That no maritime lien existed (R. 26);

(2) That the cause of action alleged was non maritime in nature, and not within the admiralty jurisdiction (R. 25).

The District Court sustained both exceptions (R. 41.) The Circuit Court of Appeals reversed the District Court as to the exception in personam and affirmed the District Court as to the exception in rem (R. 86.) No petition for rehearing in the Circuit Court of Appeals was filed as to its final decree entered January 10, 1933.

ASSIGNMENTS OF ERRORS

To the extent now material, petitioner's assignments of errors are specified as follows:

(1) That the District Court erred in ruling by its memorandum decision, filed January 14, 1931, that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar," as a result of the claim and cause of action alleged by the libel (R. 45);

(2) That the District Court erred in ruling by its memorandum decision, filed August 4, 1931, that petitioner was not entitled to a rehearing, and in adhering to its former decision (R. 45);

(3) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and thereafter filed September 18, 1931, by adjudging that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar" (R. 45, 46);

(4) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and therafter filed September 18, 1931, by dismissing petitioner's libel and cause of action therein alleged (R. 46);

(5) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and thereafter filed September 18, 1931, by awarding costs against petitioner and in favor of respondent (R. 46);

(6) That the Circuit Court of Appeals erred by its memorandum decision, filed September 8, 1932, reported in 61 Fed. (2d) 187, by ruling that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar," as a result of the claim and cause of action alleged by the libel (R. 64);

(7) That the Circuit Court of Appeals erred by its final decree entered January 10, 1933, by dismissing the libel in rem and affirming the decree of the District Court in respect to the maritime lien (R. 86).

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of excess freight money—being the difference between

the tentative maximum rate actually paid ($10.00 per M feet) and the applicable minimum rate rightly retainable ($8.50 per M feet) under affreightment contract stipulating:

> "Rate of freight $10.00 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied. (R. 5, 9, 26, 72, 73, 74, 82, 86).

ARGUMENT

As occasionally reflected by judicial comment, many of the early opinions of the admiralty courts in this country were not reported. Nevertheless, for many years, in the adoption and adaptation of the maritime law within our jurisdiction, inferior federal courts enforced against vessels maritime liens, based upon demands for return of freight or upon closely analagous claims.

Even if such history of the maritime lien asserted by petitioner, were not recorded by the authorities, the soundness of the principle underlying this particular lien would justify its present recognition, as suggested by *The Rebecca*. Fed. Cas. 11619. (D. C. Me., 1831.) In that case appears an opinion involving a libel in rem; where the court was struggling with the interpretation of the maritime law in an effort to determine the existence of a maritime lien

against a vessel for cargo damage or loss. The opinion, mentioned largely for historic review, said:

> "The ship and freight, and therefore indirectly the owners, to the amount of the value of the ship and freight, are, by the maritime law, bound to the performance of the charter party. * * *
>
> "The principle of reciprocal liens of the cargo on the vessel and the vessel on the cargo is established by the Ordonnance de la Marine * * * and is preserved in the Code de Commerce. * * * But this is not the introduction of any new and peculiar principle into the maritime code of France. It is merely sanctioning by formal action of legislation what had existed as customary law from time immemorial, and so it is considered and treated by the commentators on the Ordonnance and Code. * * *
>
> "It is objected that this is a case of the first impression, and that the reports furnish us with no decision in point. The reason has already been given, why the English reports furnish no case. The common law courts cannot give the remedy, and they will not allow the court of admiralty to take cognizance of the case. Whether it be, or be not, of the first impression in this country, I am unable to say. A very small portion only of the decisions of our courts of admiralty is in print, and we cannot, therefore, infer with certainty that the principle has never been here decided because no case is reported. But the true answer to the objection is, that *the law does not consist of cases, but of principles, and when a party claims the benefit of a principle, the true question presented for the consideration of the court, is, whether the law is so; if it is, he is entitled to the benefit of the rule, though he may be the first man who has invoked its aid.* In this case, my opinion is that the lien

> is sustained by the general principles of the maritime law, as well as by the imposing authority of the most respectable writers who have illustrated, by their labors, this branch of jurisprudence. I feel the more confidence in the opinion which I have adopted on an examination of the authorities, from being informed that it corresponds with that of merchants in this place most conversant in maritime commerce."
>
> *The Rebecca*, Fed. Cas. 11619 (D. C., Me. 1831).

An early case recognizing and enforcing a maritime lien for the return of freight money is *The Panama*, Fed. Cas. 10703 (D. C., N. Y. 1846), wherein a libel was filed in rem upon a bottomry bond. The assignee of the claim of charters, based upon freight advanced under the charter party, sought to recover thereon from the residue of the proceeds of the sale of the ship, held in court after the satisfaction of the bottomy bond. It appeared that the cargo was loaded by the charterer and freight paid, after which the owner breached the charter party by failure to cause the vessel to sail. The opinion was rendered by Betts, J., who held that the charterer was entitled to the lien upon the proceeds of the sale of the vessel by way of reimbursement for freight advanced. The opinion said:

> "On the sale of the ship and breaking up of the voyage by fault of the owner, the shipper of the cargo could have attached her in the hands of the purchaser as subject to that double lien:

(1) for the return of the cargo or its value; (2) *the repayment of the freight* advanced; and the purchaser would clearly have been allowed the amount of such liens to be deducted from the sum of the purchase money. The whole purchase money being paid into court, the adjustment of the rights of the parties in respect to it will now be the same as if it had been retained by the purchaser to await the judgment of the court and to be paid pursuant to judicial directions.

"Accordingly, I am of the opinion that Schmidt & Balshe acquired a lien upon the vessel to the amount of freight advanced by them under the charter party. That privilege passed to Quincy under their assignment, and he can, since the sale of the vessel, enforce the right against her proceeds in court, to the amount of his loss. * * *"

The Panama, Fed. Cas. 10703 (D. C., N. Y. 1846).

In the case of *Church v. Shelton*, Fed. Cas. 2714, (Mass. C. C., 1855), wherein the cargo owner sued in admiralty to recover from the vessel owner money paid as the result of fraudulent representations relative to the existence of a salvage lien, the appellate court sustained jurisdiction in personam because there would have been jurisdiction in rem, using the following language:

"And there can be no doubt since the decision of the Supreme Court of the United States in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 344, that the admiralty has jurisdiction of such a contract of affreightment in personam as well as in rem. Having juris-

diction over the entire contract, it will proceed to inquire into all its breaches and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve."

Church v. Shelton, Fed. Cas. 2714 (Mass. C. C. 1855).

The obligation of the cargo owner to contribute in general average is closely analagous to the obligation of the cargo owner to pay freight, since the freight is the food for the ship's voyage under fair weather and favorable conditions. While a general average contribution is the nourishment for the ship's sacrifices under foul weather and unfavorable circumstances.

With this background in mind, reference is made to *The St. Joseph*, Fed. Cas. 3908, (Ill. C. C., 1855), being to appeal in admiralty involving a libel in rem against a vessel to recover on a general average bond on account of the vessel's contribution for jettison of cargo. The claimant of the vessel denied the existence of the lien, claiming that the bond having been given, the lien had been waived. During the course of its opinion the court said:

"Average contribution is the creation of the maritime law, and is founded in the great principles of equity. * * * No subject can be more purely maritime than this. And it is said the contribution may be recovered in equity and in law. If the demand be a lien upon any property within the reach of the court, the proceed-

> ings may be in rem. And if any individual within the process of the court is liable, the proceedings may be against him in personam. The lien still continues on the property in the hands of the assignee. This doctrine is laid down in *Shepard v. Taylor*, 6 Pet. (31 U. S.) 675, and it has been the rule of decisions in the courts of the United States. A maritime lien adheres to the proceeds of the thing, into whose hands soever it may go, and the owner becomes personally liable, and may be proceeded against in personam. * * * It seems to be a settled principle that where the maritime jurisdiction attaches, the demand may be recovered in rem or in personam. It does not follow that where an action may be maintained on the contract, as in this case, the maritime jurisdiction may not be exercised."
>
> *The St. Joseph*, Fed. Cas. 3908, (Ill. C. C. 1855).

In another case involving a claim analagous to the demand for the return of freight, *The Hardy*, Fed. Cas. 6056 (Minn. C. C., 1870), a libel was filed in rem by a shipper to recover from the ship money collected by the master from consignees of cargo, representing the value of the cargo, the same having been carried under an agreement that the master was to collect both the purchase price of the cargo and the freight from the consignees. The court held that a lien existed despite the contention that the debt might have been recovered in an action for money had and received. The opinion of the appellate court used the following language:

"1. That a contract by which a steamboat navigating the public inland waters of the United States, engages, in consideration of freights to be earned, to carry for the libelant certain goods; and collect from the consignee the freight money and all charges, advances, and insurance on the goods, together with the price thereof, and after deducting the freight money, to pay to the libelant the balance, is not unusual in its character, and is essentially a contract for a maritime service, of which the District Court has jurisdiction in admiralty, in a proceeding in rem against the boat.

"2. That such a contract is within the scope of the master's employment, and is binding upon the owners and the vessel, in favor of a shipper who has no knowledge that the boat was at the time chartered by parties to be run for their own use and benefit."

The Hardy, Fed. Cas. 6056 (Minn. C. C., 1870).

In the case just reviewed the court went farther in the recognition and enforcement of a maritime lien than is necessary in the present litigation, since there the cargo owner was given the benefit of a maritime lien to recover the sale price of his cargo, collected along with freight money, while in the present litigation the cargo owner seeks the enforcement of a maritime lien to collect a portion of the freight money itself.

In *The A. M. Bliss*, Fed. Cas. 274, (D. C. Mass., 1872), a libel in rem was filed by a charterer, based

upon a claim of freight advanced to the vessel but not earned, because certain voyages contemplated by the charter were not prosecuted. It was held by the court that the charter was void for fraud. However, on the point of jurisdiction the court held that contracts of affreightment, whether by way of charter party or bill of lading, were within the admiralty jurisdiction, and that such a court would allow damages even though indirect. With respect to the lien for return of freight money, the opinion of the court said:

> "The District Court has full jurisdiction of contracts of affreightment, whether evidenced by charter party or bill of lading; and though the damages may in any case be somewhat indirect, as, for instance, if they arise out of a jettison which requires contribution, or out of a fraudulent payment of salvage by the master. Yet the mode in which the claim for compensation arises will not oust the jurisdiction; Dupont v. Vance, 19 How. (60 U. S.) 162; Church v. Shelton, Case No. 2714; The Panama, Case No. 10703. If, then, the fact were, as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners if the ship should for any reason, fail to perform the voyage; and *this right might be enforced against the ship.* The Panama, ubi, supra; The Pacific, Case No. 10643."

The A. M. Bliss, Fed. Cas. 274 (D. C. Mass., 1872).

Facts somewhat similar to those involved in *The Hardy*, Fed. Cas. 6056, *supra*, are found in the case of *The Emma*, *Fed.* Cas. 18218 (D. C. Miss., 1876), where a libel was filed in rem by a shipper, based upon a C. O. D. bill of lading, which required the vessel to transport the goods, collect from the consignees the price of the goods sold by the shipper to the consignees, and pay to the shipper the purchase price of the goods, less freight. It was held by the court that a lien existed in favor of the shipper against the vessel for the money collected by the master and not repaid. The opinion said:

> "It is, I believe, a settled rule, that where a cargo of goods delivered to a vessel upon a contract that the master shall convey them to some market, and there sell them for account of owner, until he makes a sale and delivers the goods he is acting as the master of the vessel, and not as the agent of the shipper; but that after he sells and receives the money he is agent of the shipper, and consequently that for any breach of contract of affreightment the vessel is liable, but for any default in payment of the money to the shipper the master is personally liable only. *But there is a marked distinction between such a case and one in which the consignor has already sold the goods to the consignee upon an agreement that money is to be paid upon delivery of the goods. In such case, the contract is entirely one of affreightment.* The master contracts for a certain sum to be paid as freight to transport the goods to the consignee and transport the money delivered to him by the consignee back to the consign-

or, or if the money is not placed upon the vessel by the consignee to retransport the goods themselves to the shipper. The duties assumed are entirely those of a common carrier and a common carrier is as much liable for a failure to transport and deliver money received by him for transportation as he is for a failure to deliver any other character of freight. The immense commercial business now transacted in this way can only be protected by this rule, which can be applied without infringing upon any established principle of admiralty, and is fully sustained in the case of The Hardy (Case No. 6056), decided by Judge Nelson. *The claim so far as proved must therefore be allowed as liens upon the vessel.*"

The Emma, Fed. Cas. 18218 (D. C. Miss., 1876).

In harmony with previous observation, it should hardly require statement to prompt the conclusion that an obligation to repay excess freight money in the hands of a shipowner is more closely related to the maritime affreightment than the obligation of the vessel owner to repay the shipper purchase price of cargo sold for the shipper's account. The debt on account of freight is inherent in the maritime contract of affreightment. The debt on account of the purchase price of goods is intimately connected with a common law contract of a sale of merchandise.

A similar case is reported in *The St. Joseph*, Fed. Cas. 12230 (D. C. Mich., 1878), where a libel was

filed in rem by forwarders and warehousemen, who delivered cargo to the respondent vessel, taking from the master a bill of lading which required the owner of the vessel to collect on delivery the charges due to libelants for storage and other advances made to rail carriers for land transportation. By the libel in rem libelants sought to enforce a lien against a vessel for non-payment of such charges. It was held by the court that the contract underlying libelants' claim was essentially and elementally a contract of water transportation, the collection of charges by the vessel owner or the master being a mere incident, and that admiralty would enforce, by means of the lien, the obligation of the ship to repay the charges collected by the master. The opinion said:

> "I see no reason to doubt the maritime character of this contract. The main business of the steamer was to transport the goods by water. This contract carriers with it such incidental and subsidiary undertakings as is usual in the trade and necessary for the convenient transaction of the business in which the propellers are engaged. * * * In the case of The Hardy, Case No. 6056, it was held by the learned District Judge for the District of Minnesota, that a contract by which a steamboat engages to carry goods and collect from the consignee the freight money and all charges, advances and insurance upon the goods, together with the price thereof, and, after deducting the freight, to pay libel-

ants the balance, was a maritime contract of which this court has jurisdiction by a proceeding in rem."

The St. Joseph, Fed. Cas. 12230 (D. C. Mich., 1878).

In *The New Hampshire*, 21 Fed. 925 (D. C. Mich., 1880), a libel was filed in rem by a shipper of cargo, loaded on board under an agreement that the master was to sell the same at port of discharge, and pay libelant the proceeds of the sale. The gist of the cause was failure of the master to repay to libelant the purchase price of the cargo. In this particular case the agreement was somewhat different than the agreement involved in *The Hardy*, Fed. Cas. 6056, *supra*, wherein the maritime lien was allowed. However, the ruling of that case was approved by the court, saying:

"If it were a simple case of a contract to deliver the cargo to a consignee named, and to collect from him the freight charges and advances, together with the price thereof, and, after deducting the freight, to pay to libelant the balance, and such a contract were shown to be usual and customary in the trade in which the vessel was engaged, I should find little difficulty in holding it to be an entire maritime contract *for which the vessel would be liable*. This was held to be the law in the case of The Hardy, 1 Dill. 460, and also by the learned judge of the District of Mississippi in the unreported case of The Emma."

The New Hampshire, 21 Fed. 925 (D. C. Mich. 1880).

With respect to *The Wyoming*, 36 Fed. 493 (D. C. Mo., 1888), the opinion shows the facts to be that freight was paid to the steamer upon a cargo by the shipper. Subsequently, duplicate freight was paid upon the same goods by the consignee. The money having been wronfully used to pay ship's expenses, it was held that admiralty had jurisdiction of the claim against the vessel for repayment. The maritime lien was enforced against the ship without any discussion in the court's opinion indicating any doubt as to the existence of the lien.

A case similar to *The New Hampshire*, 21 Fed. 925, *supra*, is found in *The Julia*, 37 Fed. 369 (C. C. La., 1889), involving a libel based upon an affreightment contract containing an obligation on the part of the master to sell the libelant's cargo and pay libelant a certain price net therefor. On this particular contract it was held that the sale of the cargo was the primary essence of the transaction, since transportation was unnecessary, providing the cargo was sold. However, it was assumed in the case that had the facts been as found in the case of *The Hardy*, Fed. Cas. 6056, *supra*, wherein a lien was enforced, the same rule would have been followed.

As observed in the petition for writ of certiorari, an opinion of the late Chief Justice Taft appears in

The Oregon, 55 Fed. 666 (1893—C. C. A. 6), wherein a maritime lien was enforced against a vessel to recover freight money which had been collected by the master and not paid to the charterer. In this case the vessel "Palms" had been chartered at a flat rate of freight, and thereafter was sublet by the charterer to a shipper at a higher rate of freight. On the discharge of cargo the shipper paid to the master the full higher rate. The charterer, to collect the difference between the higher rate received by the master and the flat rate rightly retainable by the shipowner, asserted a maritime lien by libel in rem against the vessel.

An examination of the court's opinion shows that while Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed to exist and was enforced without comment. However the existence of the maritime lien was a legal essential to the decree of the court entered against the vessel. From the opinion of Chief Justice Taft the following extracts have been taken:

> "The libels were filed in the district court * * * against the propeller Oregon and the schooner Palms, * * *.
>
> "In the libel against the Palms, in addition to the foregoing averments, it was charged that the captain of the Palms had collected from the

consignee of the iron ore carried upon one of the trips, to whom the libelant had sold the tonnage for that trip, $104 more than the charter rate, which belonged to libelant as profit upon the sale of the tonnage, and which the captain turned over to respondents. * * *.

"The master in the district court found that *the two vessels had violated their contracts,* * * *He also found for libelant against the Palms for $104.* The district court confirmed the findings, and entered the proper decree. which was affirmed by the circuit court. The difference between the contract and going rates of freight when libelant bought tonnage to carry the cargoes for the lost trip was 80 cents a ton, making $840 damages chargeable to each vessel, as well as the $104 additional *against the Palms.* * * *

"There remains to consider only the $104 *charged against the Palms.* This was the profit of 10 cents a ton on one trip of that vessel where the libelant sold the tonnage to Harvey Brown at $1.30 per ton. * * * The captain of the Palms collected the entire freight from Brown, and turned it over to Gilchrist managing owner of the Palms. The 10 cents a ton, or $104, of the freight belongs to the libelant, and *the Palms or her owners* should pay the same to the libelant. But the jurisdiction of this court in admiralty to render a decree for the money is denied on the ground that the cause of action is not maritime, but is a mere right to sue for money had and received at common law. *As the collection of the $104 was incidental to the execution of the maritime contract sued on, and may be regarded as an overcharge of freight* by appellants against appellee under that contract, we think the amount fairly recoverable as damages for its breach, and therefore fully within

> the admiralty jurisdiction. The decrees of the circuit court in both cases are affirmed."
>
> *The Oregon*, 55 Fed. 666, 668, 669, 676, 677 (1893—C. C. A. 6).

As observed by original brief in support of petition for writ of certiorari, the decision made in *The Oregon*, 55 Fed. 666, *supra*, is in direct conflict with the decision of the Circuit Court of Appeals in the present litigation. In addition, the facts upon which the maritime lien asserted by petitioner stands in the present case are stronger foundation to support such a line than the facts in *The Oregon*, 55 Fed. 666, *supra*. There the charterer's claim was based merely upon an implied obligation; here petitioner's claim is based upon an express obligation contained in the affreightment contract. In view of the facts involved, if a maritime lien is to be denied to petitioner, it would seem essential that this court directly overrule the decision in *The Oregon*, 55 Fed. 666, *supra*.

In *The Port-Adelaide*, 59 Fed. 174 (D. C., N. Y., 1893), the opinion was written by Judge Bendict, from which it appears that a libel was filed by a charterer to recover from the shipowner freight collected by the latter, based upon a charter party which provided that the shipowner was to receive a flat sum for the use of the entire vessel on a certain voyage. As alleged by the libel, the spirit of this charter party

was violated by the owner of the vessel in loading on board at ports of call enroute into vacant space, cargo belonging to third parties, in which the charterer had no interest. The libel in rem against the vessel was filed upon the theory that the freight moneys collected by the owner of the vessel for the unauthorized transportation of cargo belonging to third parties was money to which the charterer was entitled by way of reduction of the charter hire. The maritime lien against the vessel was recognized and enforced, the opinion of the court saying:

> "It is said that if the freight collected at Kioto, and paid over to the shipowners, belongs to the charterer, the libelant's claim is against the shipowner for money had and received, and is not within the jurisdiction of the admiralty. But the service performed in earning the freight was a maritime service, and the duties of the respective parties arose out of, and are fixed by, the terms of a charter party of the ship, and the ship was the instrument used in performing the service. Under such circumstances it is my opinion that a maritime lien in favor of the charterer attached to the ship for the amount of the freight earned by the steamship by transporting the cotton from Shanghai to Kioto, and withheld from the charterer by the shipowners."
>
> *The Port Adelaide*, 59 Fed. 174, 177 (D. C., N. Y., 1893).

In the present litigation the obligation of respondent to repay to petitioner the amount demanded as excess freight arises out of an express agreement,

fixing the ultimate amount of freight; while in the case just discussed the maritime lien was enforced against the vessel upon no express provision of the charter party, since the charterer's right arose merely by implication from the provision in the charter party indicating that for a flat or fixed charter hire the charterer was entitled to the whole cargo space of the vessel, even though the same was not in use for the carriage of cargo loaded by the charterer. Here again is potent precedent in support of petitioner's claim, based upon less favorable facts than those brought to this court by petitioner.

Because of the similarity of facts involved, special emphasis may be justified with respect to *The Oceano*, 148 Fed. 131 (D. C., N. Y., 1906.) In that case the opinion was written by District Judge Hough, and the proctors representing the litigants were specialists in maritime matters, John M. Woolsey, now District Judge, being proctor for the shipowner.

In this case it appears that libelant chartered the vessel "Oceano" for a voyage from Philadelphia to Japan. The charter party required that money for the vessel's disbursements be advanced by the charterer on account of the freight at the port of loading, such advances to be deducted from the freight earned under the charter party. Accordingly, money was

advanced by the libelant, receipt for which was signed by the master, reciting the same to be "on account of the freight under this bill of lading," and reciting that the same is to be "deducted in all cases from the freight earned."

Upon the vessel having arrived at destination, the libelant's agent in Kobe settled the accounts with the master, paying over the balance of the freight money, but through some inadvertence in calculation of the final settlement, a substantial sum was not deducted or credited on account of original advances made toward the freight. The erroneous settlement was reduced to writing and signed by the master. Subsequently a libel in rem was filed to recover the excess payment of freight. Attack was made upon the admiralty jurisdiction of the court, and upon the existence of a maritime lien. By its ruling the court maintained the jurisdiction and foreclosed the lien against the vessel for the amount of the excess freight owing. The court's opinion said:

> "The claimant's real objection to the demand in suit is that libelant is in truth suing for money had and received; that all the occurrences on which the suit is based arose after the fulfillment of the charter party, that the action is really therefore in assumpsit and lies only at common law. It appears to me, however, that the facts found herein constitute on the part of the claimant a breach of its charter party obligation to

repay to the libelant the entire amount of the Philadelphia advance. Whether the settlement at Kobe be regarded as an overpayment by the libelant or an under payment by the claimant, the fact remains that the claimant procured an advance of its chartered freight, promised by its charter party to repay it, and has persistently refused to do so. In my opinion, therefore, this is really a cause of affreightment, and admiralty has 'jurisdiction of all contracts of affreightment though the damages may in any case be somewhat indirect.' The A. M. Bliss, 2 Low. 103, Fed. Cas. No. 274. The damages here arise in a singular manner, but the same doctrine is laid down in Church v. Shelton, 2 Curt. 271, Fed. Cas. No. 2714, where the 'indirection' is even more marked. *'It follows from the view taken of the subject-matter of this action that the cause may be brought in rem.* The charter party especially provides that to the due execution thereof there shall be bound not only the parties themselves, but also 'the vessel's freight, tackle and appurtenances. and the merchandise to be laden on board.' It is truly pointed out by the commissioner that these words taken literally create a conventional lien on 'tackle and appurtenances' even if there be no lien upon the steamer. The quoted expression is possibly, if not probable, a misprint for 'vessel, freight, tackle and appurtenances.' But whether this be true or not, I think jurisdiction should be sustained on broader grounds. *As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom.* The Director (D. C.), 26 Fed. 708. Damages sustained by a charterer through breach of a charter contract constitute a lien on the vessel. The Panama, Olcott, 343, Fed. Cas. No. 10,703.

"It cannot be denied that unless explicitly excluded by the contract of charter party both shipper and owner may pursue their remedies for breach of contract by actions in rem. I think that much stronger words than those last quoted from this charter party should be required to oust the charterer of his usual remedy. It is strongly urged that the A. M. Bliss, supra, is inconsistent with recognition of a right of action in rem. But the learned court there drew a distinction between 'loans made on a pledge of the freight' and 'advances of freight.' The former do not imply a pledge of the ship, and failure to pay constitutes no breach of the charter party. But a failure to repay an 'advance of freight,' on the completion of the voyage was there distinctly recognized as being a breach of the charter party. As above stated, I consider the claimant's action herein as amounting to a deliberate refusal to repay an 'advance of freight' and therefore constituting a breach of the charter party that gave birth to the freight."

The Oceano, 148 Fed. 131, 132, 133 (D. C., N. Y., 1906).

By brief of respondent, resisting petition for writ of certiorari in this cause, it is asserted (p. 18) that "the only reported case involving similar facts which can be considered in point is the case of *Israel v. Moore & McCormack Co.* (D. C.), 285 Fed. 919, 920, where it was held that there was no jurisdiction in admiralty at all, but only an action in assumpsit." This extravagant and inaccurate assertion on the part of respondent is squarely met by *The Oceano*, 148 Fed. 131, *supra*, where the facts are extremely analagous.

It seems to petitioner that there is no basis for any substantial distinction between the facts in *The Oceano*, 148 Fed. 131, *supra*, and the facts upon which petitioner asserts the existence of a maritime lien in the present litigation. The only difference between the two cases on the facts is a difference fortifying petitioner's contentions. In *The Oceano*, 148 Fed 131, *supra*, the claim of the charterer for the return of excess freight was based solely upon an inadvertence or error in calculating the amount of advances to be credited upon freight moneys due. In the present litigation, petitioner's claim is based upon an express provision of the contract of affreightment, entitling petitioner to pay a certain minimum rate of freight.

In *The John Francis*, 184 Fed. 746 (D. C., Ala., 1911), a maritime lien was enforced against the vessel for repayment of demurrage and other charges demanded by and paid to the master at the port of discharge. It is true that this case did not involve the assertion of a maritime lien for freight as such, but it did involve the enforcement of a maritime lien for the collection of a claim closely analagous to freight, since demurrage is essentially nothing but additional freight charged for unauthorized use and delay of the vessel, not in contemplation when the amount of freight was determined. In this case the

demurrage having been improperly demanded by the master of the ship, the cargo owner was held to be entitled to a maritime lien to coerce reimbursement.

In *The Ada*, 233 Fed. 325 (Md., D. C., 1916), there is disclosed a libel in rem for excess freight collected by the steamer. The facts upon which the maritime lien was enforced were that cargo had been loaded aboard the vessel without a bill of lading having been signed by either the master or the ship's agent, but by the charterer alone. At the port of discharge the master collected freight in excess of the amount due. The result in this case was approved by the opinion in *The Esrom*, 272 Fed. 266 (1921, C. C. A. 2), which said:

> "So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. The Ada (D. C.), 233 Fed. 325."
>
> *The Esrom*, 272 Fed. 266, 271 (1921—C. C. A. 2).

In *The G. A. Tomlinson*, 279 Fed. 786 (1922, N. Y., D. C.), a libel in rem was enforced in favor of a shipper against the vessel for return of freight money because of delivery by the vessel of cargo at one berth, in violation of a bill of lading requirement, designating another berth. Here, again, a lien is recognized and enforced against the ship for violation of an af-

freightment contract, even though such violation did not result from damage to cargo. The court's opinion said:

> "Exceptions to the libel have been filed on the ground that no maritime lien is shown and that an action in rem is not maintainable, since to create a maritime lien the ship must be personified, and a breach of duty shown by the ship as such. It is argued by respondent that a breach of contract of affreightment for refusing to load or unload cargo at a specified place, though actionable in personam is not actionable in rem, if the merchandise was delivered in a safe and sound condition."
>
> *The G. A. Tomlinson*, 279 Fed. 786, 787 (1922, N. Y., D. C.).

In the case just reviewed the opinion observes that the attack upon the existence of a maritime lien was sought to be supported by language contained in *The Saturnus*, 250 Fed. 407, (C. C. A. 2.) This attack was defeated by the court, which observed that the denial of a maritime lien against the vessel in *The Saturnus, supra*, was predicated upon the fact that the cause of action was for the breach of an executory contract because of failure to load cargo at all. The facts before the court were distinguished from such a situation, and recovery was allowed with the enforcement of a maritime lien.

In *The Muskegon*, 10 Fed. (2d) 817 (D. C., N. Y., 1924), the right of a shipper to recover freight paid

to the shipowner by means of a maritime lien was directly recognized. In that case it appeared that the shipper's goods were loaded aboard and carried to destination under bills of lading issued and signed by the charterer's agent. The full freight was paid by the charterer to the ship. Notwithstanding this fact, at destination delivery of the goods to the consignees was refused without payment of duplicate freight, because freight money had not been paid by the charterer's agent to the charterer. Over objection to jurisdiction and to the existence of a maritime lien, the shippers were allowed a recovery in admiralty and a foreclosure of the lien.

In this case the facts disclose full performance and right delivery by the ship, except only for the extortion of the master—facts which make the case, in principle, closely analagous to facts involved in the present case.

In *The Capitaine Faure*, 10 Fed. (2d) 950, (1926—C. C. A. 2), is found an extended opinion, wherein the facts are not particularly applicable to the present review. However, as a general proposition of law, the opinion uses the following language:

> "But an action in rem lies for the breach of a contract of affreightment where the goods have been actually delivered and received on board.

That such is the established law is not controverted or in any way questioned in this suit."

The Capitaine Faure, 10 Fed. (2d) 950, 961, (1926—C. C. A. 2).

In the case of *The Henry W. Breyer*, 17 Fed. (2d) 423 (D. C., Md., 1927), shippers claimed to be entitled to recover prepaid freight because the vessel had wholly failed to break ground on the voyage after cargo was loaded. The lien was allowed and foreclosed.

The Fredensbro, 18 Fed. (2d) 988 (Pa., D. C., 1927), involved an obligation to return prepaid freight. The opinion shows the freight was paid by the charterer in advance as required by the charter party, which contained a clause to the effect that the freight was not to be returnable, even if the ship was lost during the voyage. The cause was instituted both in personam and in rem, an attack being made upon the existence of the lien by exception which was overruled. The opinion of the court said:

"It is the contention of the exceptants that a suit in rem will not lie for the return of freight money paid in advance under the terms of the charter party. The facts set out in the libel are not similar to those in Israel v. Moore & McCormack (D. C.), 295 Fed. 919, cited by the exceptants. There the libelant had voluntarily paid the entire freight money for a cargo, part of which, unknown to the shipper, had been jetti-

soned during the voyage. Under those circumstances Judge Hand held that if the libelant was entitled to recover at all it was by an action at law in quasi contract."

The Fredensbro, 18 Fed. (2d) 983, 984 (Pa., D. C., 1927).

In connection with the language just quoted, and, in fact, throughout the entire consideration of the present review, it must be kept in mind that petitioner's claim is based upon an express provision of the affreightment contract.

Previously, the analogy between a contribution for general average and an obligation for freight, has been noted. In view of such analogy, reference is made to *The Emilia S. DePerez*, 22 Fed. (2d) 585 (Md., D. C., 1927.) The libel in that case involved a claim by cargo owners to recover for general average loss, after a general average statement had been made by average adjusters, acting in behalf of the shipowner, and cash deposits paid to secure the amount due as cargo's contributive share. Upon a completion of the adjustment it was disclosed that a substantial sum of money still remained. A recovery was allowed in rem against the vessel.

This case is most certainly directly opposed to the theory of the District Court in the present cause, in respect to the ruling to the effect that there could be

no lien against the ship for freight after the cargo and vessel had been separated by the discharge at destination, and the physical aspects of the maritime service concluded. The opinion in *The Emilia S. DePerez, supra,* is support for the theory found elsewhere in the decisions, to the effect that the maritime transaction is not concluded, in law, until all of the rights of the parties arising from the contract have been settled, as respects all of the elements of such a contract, to-wit: ship, cargo and freight. The opinion, in supporting the lien against the vessel, said:

> "It therefore follows, from the very nature of general average, and from the principle that 'the vessel is bound to the cargo and the cargo bound to the vessel,' that *the vessel must be liable in rem* for its portion of the general average loss. The Allianca (D. C.), 64 Fed. 871, affirmed C. C. A. 79 Fed. 989; Dupont de Nemours v. Vance, 19 How. 162, 168, 15 L. Ed. 584."
>
> *The Emilia S. DePerez*, 22 Fed. (2d) 585, 586 (Md., D. C., 1927).

The decision of the Circuit Court of Appeals for the Ninth Circuit in the present litigation, upon careful scrutiny, seems logically quite inconsistent with its opinion in the case of *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, (1929—C. C. A. 9.) The opinion in the former decision was written by District Judge Bean, sitting with Circuit Judges Rudkin and Dietrich. From the opinion it appears

that upon the arrival of a shipment at destination, delivery of cargo was refused until the shipper had paid a substantial sum representing certain expenses incurred by the shipowner incident to discharge, storing and reloading the cargo at some port of call, justification for such expense being claimed on account of the unsafe conditions at the port of destination.

Attack upon the cargo owner's recovery of such expenses was made upon the theory that the admiralty court had no jurisdiction, and that no maritime lien existed. In overruling such a contention, the court's opinion said:

> "It is urged by the appellant that the matter here involved is not cognizable in admiralty. But the issue between the parties cannot be determined without a consideration and review of the terms of the bill of lading, and, as said by Gibson, District Judge, speaking for the Court of Appeals in 286 Fed. 918: 'From time immemorial the construction of such contracts, and the determination of issues arising out of them, has been part of the duties of courts of admiralty.' U. S. Shipping Bd. v. Banque Russo Asiatique. See, also, The G. A. Tomlinson (D. C.) 279 F. 876; The John Francis (D. C.), 184 F. 746; The Lake Eckhart (D. C.), 31 F. (2d) 804, 1924, A. M. C. 498. * * *
>
> "For the purposes of this question the averments of the answer must be and are deemed to be true. *The undertaking of a ship* to deliver goods, as evidenced by the bill of lading, is, of

course, absolute, except so far as it may be relieved either because the venture was frustrated, or by the terms of the bill of lading."

Tatsuuma K. K. K. v. Robert Dollar Co., 31 Fed. (2d) (1929—C. C. A).

As noted with respect to other authorities cited, the cargo owner's claim of a maritime lien was predicated entirely upon an implied obligation arising out of the bill of lading, while in the present cause petitioner's claim is predicated upon an express provision of the booking contract.

With respect to *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, *supra*, it may be suggested that the basis of the libel was not a claim for return of freight money. Meeting such a suggestion, it seems accurate to respond that in principle there is no difference between claim based upon a recovery of freight and a claim founded upon the recovery of expenses necessitated by unexpected difficulties in the prosecution of the voyage, since the freight is compensation for the services of the ship under favorable circumstances, while the extra expenses are compensation for services of the ship under unfavorable circumstances encountered upon the voyage.

Again mindful of the analogy between a general average contribution and an indebtedness for freight, reference is made to the case of *The Sudbury*, 33 Fed.

(2d) 293, (Cal., D. C., 1929), where a libel was filed in rem against a vessel, based upon a general average adjustment by the shipowner, alleging various errors in the adjustment. Attack being made upon the admiralty jurisdiction and the existence of a lien, the court said:

> "Respondent urges that this libel is not within the maritime jurisdiction because it is virtually an action for money had and received, for a fixed sum claimed as a part of a trust fund in the hands of the owners of the ship or the general average adjusters who made the adjustment, liability being based on transactions which occurred on land in the course of the adjustment, and therefore divorced from the maritime lien in general average. This question was fully considered and discussed in the Emilia S. DePerez (D. C.), 22 Fed. 2d) 585, 1927, A. M. C. 1839, which held that the admiralty jurisdiction attached to a libel in the nature of an action for money had and received, based upon a general average adjustment and virtually seeking an accounting for the trust funds. On the reasoning in that case, this court has jurisdiction in admiralty in the present case. * * *
>
> "The second exception must, however, be sustained, with leave to amend. The libel pleads the sums which the Sudbury and cargo should pay, and does not set forth the shares due from the Sudbury, which is alone libeled, *and which is liable for its shares only.*"
>
> *The Sudbury*, 33 Fed. (2d) 293 (Cal. D. C. 1929).

Turning from expressions of opinion by inferior federal courts recognizing and enforcing a maritime

lien against a vessel for the return of freight money, in whole or in part, attention is directed to decisions of this court reflecting its opinion concerning such a lien.

First, with respect to jurisdiction in rem, reference is made to *The Resolute*, 168 U. S. 438, 42 L. Ed. 533 (1897), where the opinion said:

> "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit in rem for a breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject matter being conceded, all other matters belong to the merits."
>
> *The Resolute*, 168 U. S. 438; 42 L. Ed. 533, 535 (1897).

Again adverting to the analogy between an indebtedness for freight and an obligation to contribute in general average, the case of *Dupont v. Vance*, 60 U. S. 162, 15 L. Ed. 584 (1857), is cited. In this cause a libel in rem was filed for failure to deliver a part of a shipment of gunpowder, the defense being based upon the fact that the cargo not delivered had been jettisoned. By this court it was held that the shipper was entitled to a maritime lien to collect the contributive share of the vessel for the general average

loss. With respect to the lien feature of the case the court said:

> "When a lawful jettison of cargo is made and the vessel and the remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, *he has a lien for that part of its value which the vessel and its freight are bound to contribute toward his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings in rem.* * * *
>
> "On full consideration, we are of the opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributive share of the general average compensation, and that the owner of the cargo may enforce payment thereof by a proper proceeding in rem against the vessel and against the residue of the cargo, if it has not been delivered."
>
> *Dupont v. Vance*, 60 U. S. 162; 15 L. Ed. 584, 586, 587 (1857).

From this case, and from other cases dealing with the maritime lien resulting from general average, and as a matter of principle, wholly apart from precedents which exist, it should logically and reasonably result that a lien should likewise exist against the vessel for return of freight money, since the general average adjustment and settlement is second-

ary and incidental to the affreightment, while the claim based upon either underpayment or overpayment of freight arises immediately from the agreement of affreightment itself.

By the petition for writ of certiorari and the original supporting brief, the case of *B. L. Harriman v. Emerick*, 76 U. S. 161, 19 L. Ed. 629 (1870), has been discussed. In that case the charterer of a vessel sued to recover a portion of freight paid because the cargo was returned to the port of loading undelivered. This court allowed the charterer to collect the freight by means of the foreclosure of a maritime lien. In principle, the only difference between that case and the present litigation is that there the vessel was obligated to return the freight because the same had not been earned, through failure to deliver the cargo, while here, the vessel owner was obligated to return a portion of the freight not earned, by virtue of the terms of the affreightment agreement, fixing the ultimate amount.

As observed by the petition and supporting brief, the maritime lien asserted in the case of *B. L. Harriman v. Emerick*, 76 U. S. 161, 19 L. Ed. 629, *supra*, was, without discussion, assumed to exist. However, its existence was essential to the decision in the case made by this court.

With respect to the cases of *Allanwilde Transportation Corporation v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. Ed. 312 (1919), and *International Paper Co. v. Gracie D. Chambers*, 248 U. S. 387, 63 L. Ed. 318, (1919) the same comment may be made. Both of these cases involved libels in rem to obtain repayment of freight money not earned because the cargo had not been transported as contemplated by the affreightment contracts. The opinions in both cases review the merits of the controversy and determine the rights of the litigants by construing and interpreting the provisions of the affreightment contracts. In neither case is there the slightest suggestion that the maritime lien sought to be asserted did not exist. All such consideration would have been wholly unnecessary in the absence of the existence of a maritime lien, which was assumed without discussion.

This court has repeatedly ruled that in the absence of jurisdictional foundation, a decision on the merits will not be rendered.

Mansfield, etc., Co. v. Swan, 111 U. S. 379, 384; 28 L. Ed. 462, 464 (1884);

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 873 (1904);

Chicago B. & Q. R. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521 (1910);

U. S. v. Mayer, 235 U. S. 55, 70; 59 L. Ed. 129, 136 (1914).

In this litigation it seems to have been continuously the theory of the respondent that no maritime lien, as asserted by petitioner, could exist against the ship with respect to its claim for repayment of excess freight money wrongfully retained, because the physical obligations of the vessel had been performed according to the affreightment contract. This theory of respondent, in which the District Court and the Circuit Court of Appeals seem to have acquiesced, overlooks the essential maritime quality inherent in freight. On many occasions, particularly in respect to general average adjustments and in connection with the determination of rights under the limitation of liability statutes, the admiralty courts have recognized that every maritime venture has three primary elements: the ship, the cargo and the freight. That freight is a separate legal entity in the contemplation of the maritime law is illustrated by three cases, one of which was decided by this court:

U. S. A. v. Freights (S. S. Mount Shasta), 274 U. S. 466; 71 L. Ed. 1156 (1927);

Grays Harbor Stevedore Co. v. Freights, 42 Fed. (2d) 935, (D. C. Wash. 1930);

Bank of B. N. A. v. Freights, 137 Fed. 534 (1905—C. C. A. 2);

Bank of B. N. A. v. Freights, 127 Fed. 859 (D. C., N. Y. 1904).

A libel was filed in rem against sub-freights alleged to be due and unpaid in the hands of a subcharterer for carriage of merchandise, to which the United States, as owner of the steamship "Mount Shasta" was entitled on account of charter hire. Contention was made that such libel could not be substained because of the nature of the res against which the libel was directed. A contrary conclusion was reached by this court in *U. S. A. v. Freights (S. S. Mount Shasta)*, 274 U. S. 466; 71 L. Ed. 1157 (1927), which recognized the libel was entitled to the same recognition as a libel in rem against either ship or cargo.

In *Grays Harbor Stevedore Co. v. Freights and Sub-Freights*, 42 Fed. (2d) 985, *supra*, litigation was instituted by libel in rem filed in behalf of the stevedore company to recover for services in loading a certain vessel. The res against which the libel was directed was the debt owing to the owner of the vessel by a shipper, as freight for transportation of cargo loaded. The court ruled that the integrity and identity of the debt as freight owing by the shipper to the vessel owner was maintained and unimpaired, despite the fact that the record showed, without dispute, that a compromise settlement had been effected between the shipper and the owner of the vessel, so that the shipper owed no debt excepting by virtue of an agreement effecting the compromise adjustment.

In *Bank of B. N. A. v. Freights*, 137 Fed. 534, *supra*, and *Bank of B. N. A. v. Freights*, 127 Fed. 859, *supra*, it appears that the litigation involved a libel in rem against freight moneys traced to the charterer's bank account. Libelant had loaned and advanced to the charterer money to pay charter hire, on an agreement that freights collected by the charterer from shippers should be applied to the debt. It was held by the court that since the libelant bank had advanced the funds to the charterer on an oral contract that it was to be protected by a lien on freights from certain vessels, libelant had a lien enforcible in admiralty. The opinion of the Circuit Court of Appeals, in allowing the recovery by means of the maritime lien on freight money, said:

> "Concluding as we do, without any hesitation, that the libelant's lien extended to the deposits in Perry's bank account, we think it clear that the libelant was entitled to assert its lien upon those proceeds in a court of admiralty to the extent to which they could be traced, *and by an action in rem*. The action being one to enforce a maritime hypothecation, jurisdiction is complete (numerous citations), and it is quite immaterial that, superadded to the lien and the remedy in admiralty the libelant may also have had an equitable lien and a remedy in a court of equity to reach the proceeds in the bank account of Perry as its fiduciary."
>
> *Bank of British N. A.*, 137 Fed. 534, 538 (1905—C. C. A. 2).

The decisions upon which petitioner relies in its assertion of a maritime lien in the present cause having been reviewed, it is approprate to comment upon the cases tendered by respondent as support for its contentions that such lien does not exist. Apart from discussion of petitioner's authorities, brief of respondent resisting petition for writ of certiorari cites only the following cases:

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore. 1901);

Brown v. West Hartlepool, etc., Co., 112 Fed. 1018 (1902—C. C. A. 5);

The S. L. Watson, 118 Fed. 945 (1902—C. C. A. 1);

The Poznan, 276 Fed. 418 (D. C., N. Y. 1921);

The G. A. Tomlinson, 279 Fed. 786 (D. C., N. Y. 1922);

Israel v,. Moore & McCormack Co., 295 Fed. 919 (D. C., N. Y. 1920);

Compagnie, etc., v. Bonnasse, 19 Fed. (2d) 777 (1927—C. C. A. 2);

Pillsbury Flour M. Co. v. Interlake S. S. Co., 40 Fed. (2d) 439, (1930—C. C. A. 2);

United Fruit Co. v. U. S. S. B. E. F., 42 Fed. (2d) 222 (D. C., Mass. 1930);

Vanderwater v. Mills, 60 U. S. 82; 15 L. Ed. 554 (1857);

The Keokuk, 76 U. S. 517, 19 L. Ed. 744 (1870);

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 67 L. Ed. 364 (1923).

Preliminary to special comment, petitioner feels safe in the broad assertion that no one of these cases is persuasive authority for a denial of the maritime lien claimed by petitioner. Examination of most of the cases shows that they are not even in point.

In *Taylor v. Weir*, 110 Fed. 1005, it appears that libel in personam was filed to recover broker's commissions claimed to have been earned in negotiating a charter party. The opinion indicates there was involved no question of a maritime lien. The court merely held that a contract to make in the future a maritime contract is not necessarily maritime, saying:

> "The test is to be applied to the subject and not to the object. It is the subject matter of the contract which must be maritime, and not the mere object—the ship. Zeigler v. The Paola R. (C. C.) 32 Fed. 174. The fact that the agreement for commissions constitutes a clause in the charter party does not make it a maritime contract."

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore., 1901).

This decision is simply not in point, and petitioner is at a loss to appreciate the reason for its being cited to this court.

In the case of *Brown v. West Hartlepool, etc., Co.*, 112 Fed. 1018, (1902—C. C. A. 5) no consideration of a maritime lien is disclosed. The libel filed was in personam by brokers against the shipowner to recover compensation as agents for the negotiation of a charter party. The case is very similar to that of *Taylor v. Weir*, 110 Fed. 1005, *supra*, which is cited and followed. The decision is entirely beside the point under consideration in the present litigation.

The S. L. Watson, 118 Fed. 945, does actually involve a libel in rem. The basis for the litigation was a contract of affreightment, covering a fleet of several barges, made with the owner thereof for a series of voyages by each barge. No claim was made by the libelant on account of any voyage which had actually been performed, the libelant's claim being based solely upon a failure to load and carry contemplated cargo. The opinion of the court states:

> "The only claim is for the breach of a contract, which, so far as the remaining three cargoes were concerned, was completely executory."
>
> *The S. L. Watson*, 118 Fed. 945, 952 (1902—C. C. A. 1).

In effect, the opinion of the court in this case merely denied a maritime lien upon a particular barge for the failure of the owner of several barges to cause his fleet to load and carry cargoes contemplated by a

general contract of affreightment affecting the entire fleet. The opinion says that as regards the barge subjected to the libel, there had never been a union of cargo and vessel. With the denial of the lien in this case petitioner has no quarrel, since the case undoubtedly announces the true rule upon the particular facts involved. However, the case is not in point in the present litigation.

It is true that a libel in rem is involved in *The Poznan*, 276 Fed. 418, (N. Y. D. C. 1921). By the opinion it appears that the libel was filed both in rem against the ship and in personam against the shipowner and the charterer, upon a claim by shippers for the return of freight money and damages because the vessel failed to discharge cargo at port of destination, returning the same to the port of loading, and because cargo had been pilfered and damaged. However, there is no denial of a maritime lien in this case, the court having recognized and enforced a lien, despite the fact that the bills of lading were signed by the charterer. The opinion of the court merely said:

> "Most of them (bills of lading) were in fact signed by the company (charterer) but a few by the master. So far as concerns the ship, it makes no difference. Being once laden she was bound for right delivery, though the charterers sign."
>
> *The Poznan*, 276 Fed. 418, 432 (D. C. N. Y. 1921).

Based upon the language quoted, respondent's brief suggestively argues that a maritime lien arises only because a vessel failed to make "right delivery" of cargo. Petitioner's response to such a suggestion is that the phrase "right delivery," properly interpreted, includes not only the physical but the legal obligations of the ship.

The G. A. Tomlinson, 279 Fed. 786, (D. C. N. Y.) 1922) is one of the cases upon which petitioner has relied, the same having been heretofore discussed in this brief. It seems to afford no consolation to respondent.

The case of *Israel v. Moore & McCormack Co.*, 295 Fed. 919, (D. C. N. Y. 1920), is not in point upon a consideration of the existence of a maritime lien, since the libel in that case was one in personam. The decision, although strenuously urged by respondent in its attack upon admiralty jurisdiction in the present litigation, in both lower courts, was discussed and overruled by the Circuit Court of Appeals for the Ninth Circuit in its opinion in this cause, concluding that the admiralty court had jurisdiction of petitioner's libel in personam (R. 70, 71).

Another case cited by respondent involved no consideration of the existence of a maritime lien. In *Compagnie, etc. v. Bonnasse*, 19 Fed. (2d) 777,

(1927—C. C. A. 2) libelant, as a time charterer of a vessel, which caught fire resulting in a general average loss to cargo, sued in personam to secure the ship's contributive share, the shipowner having obtained from a bank a general average bond in favor of libelant. The assets and liabilities of such bank were acquired and assumed by another bank. In the litigation libelant named the original obligor on the bond and the successor bank as respondents. A third bank was joined as a garnishee respondent. The jurisdiction of admiralty was attacked with respect to the libelant's general average claim and the incidental garnishment. By the court it was held that the original general average bond was maritime; that while the agreement of the respondent bank to acquire and assume all the assets and debts of the original obligor on the bond was doubtless inclusive of some non-maritime obligations and debts, the liability of the bank to the libelant on the bond thus assumed was maritime, and the funds garnished were held to be properly impounded in admiralty. However, as already observed, the case involved no question of a maritime lien asserted against a vessel. The decision was cited by pettiioner to both lower courts in support of petitioner's claim that admiralty had jurisdiction in personam of the present litigaiton.

In *Pillsbury Flour M. Co. v. Interlake S. S. Co.*, 40 Fed. (2d) 439, (1930—C. C. A. 2), examination of the opinion uncovers no consideration of the existence of a maritime lien. The libel was filed by a cargo owner against a shipowner for cargo damage to wheat under a bill of lading providing for transportation and "winter storage" on the Great Lakes from November to the following April. The court merely held that the bill of lading contemplated two distinct services, one of carriage by water and the other of winter storage of grain. The decision by no stretch of imagination is in point at the present stage of this litigation.

Likewise another case mentioned by respondent to this court involves no question of a maritime lien. In *United Fruit Co. v. U. S. S. B. E. F.*, 42 Fed. (2d) 222 (D. C. Mass., 1930), an action at law was commenced in the state court and removed to the federal court. The basis for plaintiff's claim made it necessary to determine whether a certain "operating agreement" between the Shipping Board, as owner, and a certain steamship company, as agent, was of such a maritime nature as to be subject under the Suits in Admiralty Act to adjudication outside of the District Court. It was held that while the operating agreement contained maney non-maritime stipulations, the same were all merely incidental to the maritime fea-

tures of the contract, and hence admiralty alone would have jurisdiction under the statute mentioned. Once again the case is not in point in determining the existence of a maritime lien.

Of the three cases decided by this court, cited by brief of respondent, comment is first made with respect to *The Keokuk*, 76 U. S. 517, 19 L. Ed. 744 (1870). In this case a libel in rem was filed by shipper of wheat loaded into a barge without the knowledge of the barge owner, who was also the owner of the steamship "Keokuk." In ignorance of the loading of wheat aboard the barge, the steamship failed to take the barge in tow. The barge sank while alongside the dock. This court concluded from the evidence that the cargo of wheat had never been accepted by the steamship or its owner, that no contract of affreightment had ever been made, and that, hence, no lien existed against the steamship. The opinion of this court observed:

> "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo

to which it relates has been delivered to the custody of the master or someone authorized to receive it. The Freeman v. Buckingham, 18 How. 188, (59 U. S. XV, 343)."

The Koekuk, 76 U. S. 517; 19 L. Ed. 744 (1870).

If the decision just summarized is of any value in the present litigation, it is suport for the contentions of petitioner, and not for the contentions of respondent, since in the present litigation there was union of cargo and vessel, under the provisions of an affreightment contract, evidenced by an instrument in writing signed by both cargo owner and vessel owner. And although the quoted language of this court was used in consideration of different facts, it still is suggestive of the existence of a lien upon the present facts. To repeat:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master;"

The Keokuk, 76 U. S. 517; 19 L. Ed. 744 (1870).

Discussion of the remaining two cases decided by this court, cited by brief of respondent, has been deferred because they are the only authorities which apparently influenced the Circuit Court of Appeals in its denial of the maritime lien in this cause (R. 72, 73). Reference is made to *Vanderwater v. Mills*,

60 U. S. 82; 15 L. Ed. 554 (1857), and *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364 (1923). By its denial of a maritime lien in the present litigation, the Circuit Court of Appeals misapplied and misinterpreted the language of this court in these two decisions.

In the earlier case the opinion discloses that the owners of the vessel "Yankee Blade" and the owners of the vessel "America" entered into a contract with respect to the transportation of certain passengers and cargo, whereby the "Yankee Blade" was to perform the carriage from New York to Panama, and whereby the "America" was to continue the carriage from Panama to San Francisco. The "Yankee Blade" having refused performance, the owners of the "America" commenced an action in rem against the "Yankee Blade" for breach of contract. This court held that there was no charter party or other contract of affreightment, but merely a contract of special and limited partnership in the business of transporting passengers and cargo between the initial port of New York and the final port of San Francisco. A maritime lien was asserted against the vessel for failure and refusal to load or take aboard cargo and passengers. In classifying the arrangement between the owners of the two vessels as non maritime, this court said:

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common law."

Vanderwater v. Mills, 60 U. S. 82, 92; 15 L. Ed. 554, 557.

A careful review of this case prevents any serious contention that the facts involved there are parallel to the facts in the present cause. They are so dissimilar as to demand a different ruling as to the existence of a maritime lien, and to justify the use of language not necessarily applicable.

That portion of this court's opinion in the former case which was quoted by the Circuit Court of Appeals (R. 72, 73) reads as follows:

"This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel.

> Where there is a charter party, its covenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon. de Mar., b 3, tit. 1, art. 11), that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectee) by the covenants of the charter party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration."
>
> *Vanderwater v. Mills*, 60 U. S. 82; 15 L. Ed. 554.

From the phraseology quoted, respondent and the lower courts apparently join in drawing the conclusion that the maritime lien has been limited thereby so as to exclude the maritime lien asserted by petitioner. On the contrary, it seems to petitioner that the language quoted is support for its contentions. Hence the repetition:

> "The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter party, its covenants will define the duties imposed on the ship."
>
> *Vanderwater v. Mills*, 60 U. S. 82; 15 L. Ed. 554.

Throughout the entire litigation it has been assumed and conceded by both litigants and by both lower courts that petitioner's cargo having been load-

ed aboard the steamship of respondent under a valid contract of affreightment, the steamship owner would have had a maritime lien against the cargo for non-payment or underpayment of freight. Such being the law, in view of the criterion for determining the existence of a maritime lien adopted by this court in *Vanderwater v. Mills, supra*, it is difficult to appreciate resort to that case as authority for denial of the maritime lien asserted by petitioner as cargo owner against the steamship of respondent for repayment of excess freight. Certainly the phraseology of this court's opinion in *Vanderwater v. Mills, supra*, is broad enough to include a maritime lien for violation not only of the duty to deliver cargo in good condition and to deliver cargo at the time and place specified, but also the duty to transport the cargo for freight in a sum no more and no less than the amount agreed by the affreightment contract.

Discussion naturally leads to the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364, since there the case of *Vanderwater v. Mills, supra*, was cited and quoted.

Again in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364, this court considered the existence of a maritime lien founded upon the shipowner's failure to load cargo. In this case the libelant chartered the whole space of a steam-

ship for carriage of a full cargo of lumber. Most of the agreed shipment having been loaded, the vessel refused to accept the entire quantity tendered upon the excuse that the vessel had been laden to capacity. The libelant asserted a maritime lien for damages resulting from a portion of the cargo having been left on the dock unloaded.

In concluding that no maritime lien existed, this court used language quoted by the Circuit Court of Appeals (R. 73) as follows:

> "The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vanderwater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See The Thomas P. Sheldon, 113 Fed. 779, 782, 783."
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364.

When the quoted phraseology was used by this court, once again the facts involved were wholly unlike the facts now presented in this litigation. Such

expression of opinion was, under the circumstances, necessitated and justified because the lien then claimed had not been adopted into the maritime law of this country by decisions over a period of many years. But the lien asserted by petitioner requires no extension of the ancient right beyond the limits of past judicial recognition. The principle involved by petitioner is not new, but old. In the present case it is only the method provided by the contract for determining the exact amount of freight which is unusual. The resulting admixture of right and remedy afforded by the maritime lien is ordinary.

The very same quotation employed by the Circuit Court of Appeals in denying the existence of a lien in the pending cause is urged upon this court by petitioner in support of its contentions. As announced by the opinion in *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*, it is not the contract alone which creates the lien. But the affreightment contract, plus the union of cargo and freight for the purpose of carriage thereunder, plus the violation of an express provision of that contract, fixing the amount of freight rightly payable and retainable, by withholding a sum in excess thereof, does create a lien.

Based upon the cases of *Vanderwater v. Mills, supra*, and *Osaka Shosen Kaisha v. Pacific Export*

Lumber Co., supra, respondent, in the lower cocrts and by its brief resisting petition for writ of certiorari, has argued that the maritime lien asserted by petitioner is non-existent because all liens available to the cargo owner and the shipowner must be reciprocal. That maritime liens arising under an affreightment contract must be mutual and reciprocal as between the cargo owner and the ship owner is a principle well entrenched in the maritime law by the announcements of this court. However, by petitioner's assertion of a maritime lien in this case no attempt is made to violate such principle, but rather to enforce the same.

The books contain innumerable admiralty decisions awarding to shipowners the benefits of a maritime lien against cargo for non-payment or underpayment of freight. Applying the test of mutuality and reciprocity it must follow that the cargo owner has an equal right to a lien against the vessel for return of freight unearned, in whole or in part. Petitioner suggests that the confusion of principle arising in the lower courts upon respondent's argument has resulted merely from the fact that upon a commercial venture the shipowner has possession of the cargo, while the cargo owner almost never has possession of the ship. In other words, resulting from practical necessities and custom, the maritime lien of the shipowner

against cargo for non-payment or underpayment of freight has always been limited with a possessory aspect, while the martime lien of the cargo owner against the ship for wrongful retention of freight or for other violations of contract has been free of any such possessory restriction.

In the lower courts it was argued by respondent, and it was suggested (R. 74) by the Circuit Court of Appeals, that the lien claimed by petitioner was unjust and inequitable because its existence was secret. The same criticism may be advanced with respect to all maritime liens. But the criticism is not justly directed to the lien asserted by petitioner in this case as a basis for its denial, although the criticism was appropriately made by this court in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, and in *Vanderwater v. Mills*, *supra*, where either there was no contract of affreightment in existence, or there was no actual union of cargo and ship under the contract.

In the opinion of this court in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, resort is made to a quotation from the opinion in *The S. L. Watson*, 118 Fed. 945, *supra*, to the following effect:

> "The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been

> decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured."
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364.

It is undoubtedly this language that prompted the Circuit Court of Appeals in the pending litigation to criticize the maritime lien asserted here as a secret lien. This criticism entirely overlooked the fact that in the case of *The S. L. Watson*, *supra*, in the case of *Vanderwater v. Mills*, *supra*, and in the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, there was lacking one of the vital essentials to a maritime lien: either the affreightment contract itself or the union of cargo and ship thereunder. In the present litigation there is no such absence of any necessary element. In this case there is present a valid affreightment contract, evidenced by formal instrument in writing, signed by petitioner and respondent. In this case there is present a union of cargo and ship for the purpose of transportation under such contract. In this case there is present the subsequent payment and acceptance of freight money for the transportation service. With this background, can it possibly

be said with justice and accuracy that there is no such "visible occurrence relating to the vessel or cargo" as to support a maritime lien?

To reach a correct answer to this query, applying the test of mutuality and reciprocity of maritime liens, it is only necessary to ask whether a shipowner would have a maritime lien against cargo if the same were founded upon a contract of affreightment under which cargo had been loaded and transported, for which service the cargo owner had not paid the full amount of freight as agreed. In such a case the right of the shipowner would be recognized without hesitation. Petitioner submits that its right to a maritime lien in this case should be likewise recognized by this court.

CONCLUSION

Wherefore, petitioner prays:

(1) That this court will sustain the maritime lien asserted by petitioner in this cause;

(2) That this court will reverse the ruling and decree of the Circuit Court of Appeals for the Ninth Circuit, denying such lien and dismissing the libel in rem;

(3) That this court will direct said Circuit Court of Appeals to remand this cause in rem to the District Court for trial upon the merits.

Respectfully submitted,

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